Supreme Court, U. S.
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In the Supreme Court of the United States

No. 78-642

MILTON J. SHAPP, Governor; GERALD GORNISH, Acting Attorney General; CARYL M. KLINE, Secretary of Education; GEORGE S. PULAKOS, Secretary of Transportation; LEONARD BACHMAN, M.D., Secretary of Health; KENT D. SHELHAMER, Secretary of Agriculture; MAURICE K. GODDARD, Secretary of Environmental Resources, and the GOVERNOR'S JUSTICE COMMISSION,

Appellants

v.

ROBERT E. CASEY, State Treasurer
and
THE GENERAL ASSEMBLY OF THE COMMONWEALTH OF PENNSYLVANIA,

Appellees

On Appeal From the Supreme Court of Pennsylvania

SUPPLEMENTAL APPENDIX TO JURISDICTIONAL STATEMENT

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SUPPLEMENTAL APPENDIX TO JURISDICTIONAL STATEMENT

[PREFATORY NOTE: The dissenting opinion of Mr. Justice Roberts as reproduced below supersedes the dissenting opinion appearing at pages 29a-39a of the appendix to the jurisdictional statement.

Footnote 3, appearing below at page 49a, was inadvertently omitted from the original version. On page 52a, the footnote appearing thereon has been renumbered accordingly.]

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

No. 214 January Term, 1977

Milton J. Shapp, Governor, et al.,
Appellants

v.

Grace M. Sloan, State Treasurer,

and

The General Assembly of the Commonwealth of Pennsylvania

No. 586 January Term, 1976

Milton J. Shapp, Governor, et al.,

v.

Grace M. Sloan, State Treasurer,

and

The General Assembly of the Commonwealth of Pennsylvania

Appellant

No. 4 January Term, 1977

Milton J. Shapp, Governor, et al.,

Appellants

v.

Grace M. Sloan, State Treasurer,

and

The General Assembly of the Commonwealth of Pennsylvania

Appeal from the Final Order of the Commonwealth Court of Pennsylvania at No. 1194 C.D. 1976 and Cross-Appeals from the Commonwealth Court's Order dated July 15, 1975.

DISSENTING OPINION

ROBERTS, J. Filed: Jul 19 1978:

I dissent from the majority's holding that Acts 117[1] and 17-A[2] prevent the executive authority of Pennsylvania from using funds which the Law Enforcement Assistance Administration (LEAA) granted the Commonwealth to fund the Office of the Pennsylvania Special Prosecutor. I must also express my disagreement with the majority's assertions that a letter written by two members of the General Assembly and the Lieutenant Governor constitutes legislative action authorizing attorneys which those individual members have retained to seek intervention in this case on behalf of the entire General Assembly.

I.

A.

Acts 117 and 17-A must be interpreted so that they do not conflict with a federal statute. Any other interpretation is unconstitutional under the Supremacy Clause. U.S. Const. art. VI. Congress intended that the LEAA funds granted to Pennsylvania to fund the Office of the Special Prosecution be controlled solely by the executive authority of Pennsylvania and not by the Legislature. See Omnibus Safe Streets and Crime Control Act of 1968, P.L. 90-351, 82 Stat. 197, as amended, 42 U.S.C. §3701

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[1] Act of June 29, 1976, P.L. 469, §§1 et seq., 72 P.S. §§4611 et seq. (Supp. 1978). This bill was introduced by Senator Cianfrani.

[2] Federal Augmentation Appropriation Act of 1976, Act of July 1, 1976, P.L. 1383, §§ 1 et seq.

et seq. (1970 & Supp.), discussed infra. Therefore, Act 117 may not be interpreted, as the majority erroneously interprets it, to permit the Legislature to cut off federal funding of the Office of Special Prosecutor. So too Act 17-A may not be interpreted, as the majority interprets it, actually to cut off these funds. I am unwilling to attribute to Acts 117 and 17-A the unconstitutional mission of denying to the state executive authority Federal funds which the Congress has placed within the control of the executive. See Statutory Construction Act, 1 Pa. C.S.A. §1922(3) (Supp. 1978); *Sweet v. P.L.R.B.*, 457 Pa. 456, 462, 322 A.2d 362, 366 (1974) (Roberts, J. joined by Nix, J., concurring).

The majority asserts that there is no reason to believe Congress intended to give sole control of LEAA funds to the executive branch of state government. Congress, however, made the contrary intent perfectly clear in the Omnibus Safe Streets and Crime Control Act of 1968, P.L. 90-351, 82 Stat. 197, as amended, 42 U.S.C. §§3701 et seq. (1970 & Supp.). Section 203(a), 42 U.S.C. §3723(a), provides that funds will be granted to a State planning agency which "shall be created or designated by the chief executive of the State or by State law and shall be subject to the jurisdiction of the chief executive."

With the aid of federal funds, this executive department planning agency is to develop a State plan to improve law enforcement in the state. Omnibus Crime Control Act, §§301, 303, 42 U.S.C. §§3721, 3733. Pursuant to the State plan, state and local law enforcement officials and agencies are to receive and spend these funds. Id. §§303, 304, 42 U.S.C. §§3733, 3734. Congress thus made clear that funds which it has appropriated

to the LEAA for improving state law enforcement are to be spent under plans designed and operated by the executive branch of state government, whose task it is to enforce the law.[3]

It was not until the fall of 1976, after Acts 117 and 17-A denied funding to the Pennsylvania Special Prosecutor's Office that Congress gave state legislatures a role in designing and approving State plans for LEAA assistance. Even then, Congress made the role of state legislatures purely advisory to the executive branch. Act of October 15, 1976, P.L. 94-503, §108, 90 Stat. 2411, 42 U.S.C. §3726.

In determining that State executive officers should retain control of projects funded by LEAA block grants under the Omnibus Crime Control Act, Congress was by no means limiting any "undoubted attribute of state sovereignty." *National League of Cities v. Usery*, 426 U.S. 833, 845, 96 S.Ct. 2465, 2471 (1976). The Act simply gives control of federal funds, granted for use in law enforcement, to the executive branch of state gov-

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[3] By contrast, for example, the Elementary and Secondary Education Act of 1965, Act of April 11, 1965, P.L. 89-10, §§2 et seq., 79 Stat. 28, as amended, 20 U.S.C. §§241c et seq. (1970 & Supps.) (ESEA), provides that monies shall be granted to a "State," or a "State educational agency," 20 U.S.C. §241g(a)(1), without specifying which branch or branches of state government should supervise activities funded by ESEA or the agency which directs the activities. In *Wheeler v. Barrera*, 417 U. S. 402, 416-17, 94 S.Ct. 2274, 2283 (1974), the Supreme Court held that the ESEA "evinces a clear intention that state constitutional spending provisions not be pre-empted . . . ." The reasoning of *Wheeler* applies with equal force to state statutory proscriptions on spending.

ernment. This Congressional decision recognizes that the executive branch traditionally has the greatest expertise and experience in the law enforcement field. The Act does not purport to impose any particular plan of law enforcement upon an unwilling state. Section 518(a) specifically disavows any federal authority to usurp state police functions. 42 U.S.C. §3766(a).

The Legislature's action, which prevented use of federal funds granted to run the Office of the Special Prosecutor, established under Pennsylvania's LEAA plan, violates the Congressional plan to aid state executive authorities in promoting the effective administration and enforcement of the criminal law. Neither the state legislature nor the state courts may alter the Congressional decision to give the executive branch control over these federal funds. Neither may the Legislature prevent the state executive from using federal funds for the purpose for which they were granted to the state by Congress and the LEAA. Acts 117 and 17-A, as applied by the majority, violate the express provisions of the Omnibus Crime Control and Safe Streets Act. Such an interpretation makes Acts 117 and 17-A unconstitutional under the Supremacy Clause, U.S. Const. art. VI. I would therefore interpret Act 117 so as not to give the Legislature control of those federal funds which Congress has appropriated to the exclusive control of the executive branch of state government, and would interpret Act 17-A so as to permit the executive branch to continue to receive and use LEAA funds.

When a state receives federal funds granted to it for a specific purpose, as here, for the Office of the Special Prosecutor, and then, as the majority permits, withholds these funds from that purpose, it must be apparent that the state is in violation of its governmental trusteeship of the granted funds. Here the executive has always sought, prior to and during this long-delayed litigation, to use these funds for the Office of the Special Prosecutor in accordance with the terms of the Congressional mandate and the LEAA grant. Acts 117 and 17-A, as interpreted by the majority, may not serve as the basis for withholding the federal funds granted and received by the state for the Office of the Special Prosecutor.

B.

The majority's interpretation of Acts 117 and 17-A not only offends the Supremacy Clause of the United States Constitution, and makes those acts unconstitutional, but the majority's application of these acts to withhold federal funds granted to the executive for the Office of the Special Prosecutor also violates the separation of powers doctrine as this Court has applied it to Pennsylvania government. The Special Prosecutor directed the work of the 1974 Special Investigating Grand Jury probing allegations of political and official corruption in Philadelphia. Acts 117 and 17-A, as applied by the Commonwealth Court and the majority, permit the legislative branch to curtail an investigation lawfully directly by the executive under the guidance of the judiciary. This Court has held that the Legislature may not, consistent with the Pennsylvania scheme of separation of powers, by statute deny a district attorney and a legally constituted investigating Grand Jury the power to continue its investigation. *Dauphin County Grand Jury Investigation Proceedings (No. 2)*, 332 Pa. 342, 348-58, 2 A.2d 802, 804-09 (1938).

By interpreting Acts 117 and 17-A to cut off federal funds to the Special Prosecutor, the majority allows the Legislature indirectly, through power over the purse, to stifle an investigation, which the Legislature may not do directly. Id. At the time of argument concerning the application for an injunction pending appeal in this case, November, 1976, employees of the Special Prosecutor's Office had worked for two months without compensation.[4] The number of active investigations had dropped from nineteen to four. The staff could not continue to work without pay indefinitely, and eventually Acts 117 and 17-A, as interpreted by the Commonwealth Court and the majority, resulted in the demise of that Office and the end of its investigations. There is in reality no legally comprehensible distinction between an act of the Legislature specifically terminating an investigation begun by a prosecutor and a Grand Jury, *Dauphin County Grand Jury Investigation Proceedings (No. 2)*, supra, and an act that, as here, is interpreted to shut off all funding to the Special Prosecutor and to end the functional life of the investigating Grand Jury. Either approach infringes upon those functions reserved to the executive and the judiciary. Cf. *Commonwealth ex rel. Carroll v. Tate*, 442 Pa. 45, 274 A.2d 193 (1971) (Courts must be funded to allow them to carry out their constitutional duties). Here, of course, no state funds were provided the Special Prosecutor, and federal funds granted by LEAA were withheld.

Interpreting Acts 117 and 17-A in a manner which ends the ability of a Grand Jury to function ignores "the

[4] During this time, the staff of the Special Prosecutor shrank from 43 to 17.

grand jury's . . . special role in insuring fair and effective law enforcement. . . . The grand jury's investigative power must be broad if its public responsibility is adequately to be discharged." *Calandra v. United States*, 414 U.S. 338, 343-44, 94 S.Ct. 613, 617-18 (1974). The Grand Jury's investigative power may not be limited or, as here, terminated by legislation which is interpreted to withhold allocated federal funds. See 42 U.S.C. §§3733, 3734. Nor will our Constitution tolerate the refusal to provide state funds to this vital arm of law enforcement. Cf. *Commonwealth ex rel. Carroll v. Tate*, supra.

II.

The majority's notion that the General Assembly may properly intervene as a party to this litigation is unsupported both factually and legally. The Assembly neither passed a resolution directing its officers to request intervention in this litigation, nor a statute or resolution authorizing any of its officers to request intervention or otherwise participate in lawsuits. Moreover, the General Assembly has passed no legislation authorizing the expenditure of funds for payment of counsel fees. If anything is certain in the legislative process, it is that a legislative body expresses its official views by enacting statutes or adopting resolutions. See generally, Pa. Const. art. II, §§1, 9.

Ernest P. Kline, President of the Senate and Lieutenant Governor, Martin L. Murray, President pro tempore of the Senate, and Herbert Fineman, then Speaker of the House, are the only three of the General Assembly membership who have expressed any desire for the Legislature to intervene in this litigation. They did so in

a letter to a law firm, whom they purported to engage as counsel for the General Assembly. These three officers can not speak or act for the General Assembly without legislative authorization to do so. The signatories to this letter are elected pursuant to the Pennsylvania Constitution and constitutionally exercise only those duties the Assembly delegates to them. Pa. Const. art. II, §9; art. III, §17. The authority to seek intervention in this or any other litigation has not been delegated to these officers. The General Assembly therefore cannot be a party to this litigation.

This view does not impermissibly involve a judicial intrusion into the internal affairs of the Legislature. See *Sweeny v. Tucker,* 473 Pa. 493, 375 A.2d 698 (1977). Indeed, it protects the Legislature and enables it, as it chooses, to act as a body or through those officers to whom it has delegated its authority, without fear that unauthorized individuals will attempt to usurp its functions.

III.

It is indeed regrettable that the majority, by misconstruing and misapplying Acts 117 and 17-A frustrates the important work of the 1974 Special Investigating Grand Jury and stultifies the functioning of both the executive and judicial branches of our government in the enforcement of the criminal law. It is equally regrettable that the majority chooses to ignore the careful and clear Congressional plan for aiding state law enforcement authorities and to withhold federal funds allocated for that purpose. In so withholding these funds, and in refusing to provide for payment of state funds, the majority most

unwisely makes this, or any other, investigating grand jury depend upon the will of those with power over the purse.

"The very genius of our tripartite Government is based upon the proper exercise of their respective powers together with harmonious cooperation between the three independent Branches. . . . However, if this cooperation breaks down, the Judiciary must exercise its inherent power to preserve the efficient and expeditious administration of Justice and protect it from being impaired or destroyed." *Commonwealth ex rel. Carroll v. Tate,* 442 Pa. 45, 53, 274 A.2d 193, 197 (1971) (citations omitted). At this late stage in our understanding of the needs, functions, and obligations of our co-equal branches of government, a decision approving a doctrine of fiscal power without accountability over so crucial a part of the administration of criminal justice can only be viewed with concern. Moreover, it is a decision which, when implemented in the manner reflected on this record, invites public disrespect.

The Commonwealth Court order, dated October 5, 1976, denying the office of Special Prosecutor federal funds allocated for its operation had the practical effect of closing down the Office. What the record plainly reveals is that without federal funds, the Office of Special Prosecutor became inoperative and incapable of performing its vital prosecutorial function, despite the efforts and dedication of prosecutors and staff who remainded and worked for several weeks, and, in some instances, months, without being paid. Without the Special Prosecutor the investigating Grand Jury became ineffective and lifeless. Without an active and functioning Grand Jury, the in-

vestigation into political and governmental corruption came to an abrupt halt.

Viewed pragmatically, the majority's affirmance today of the Commonwealth Court order represents an exercise in futility. Both the Special Prosecutor and Grand Jury have been functionally nonexistent since late 1976. During the intervening months, the majority failed to disturb that order. See *Shapp v. Sloan,* No. 586 January Term, 1976 (Pa. Nov. 23, 1976) (Roberts, J., and Pomeroy, J., dissenting) (order denying injunction pending appeal).

One can only hope that in the near future, in another setting, the majority will change its view and adopt an approach more in harmony with today's enhanced public interest in the prompt and effective investigation of political and governmental corruption.

I dissent.

Mr. Justice O'Brien joins in this dissenting opinion.